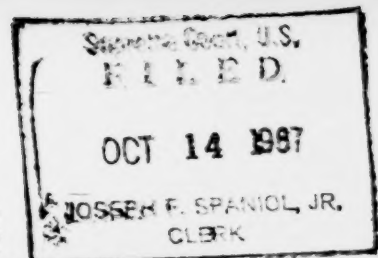


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No. ....

In The  
**Supreme Court of the United States**  
October Term, 1987

JOE ROSETTI,

*Petitioner,*

versus

AVONDALE SHIPYARDS, INC.,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED FOR REVIEW**

A. May a shipbuilder covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., injured on a ship under construction assert a claim under Section 5(b) of the Act, which permits negligence actions by shipbuilders against a vessel, when the waterborne structure upon which the injury occurs meets the Act's definition of vessel, as well as the general code definition of vessel contained in 1 U.S.C. Section 3?

B. May a contractor be deemed the "employer" of a shipbuilder covered by the Longshore and Harbor Workers' Compensation Act and employed by a subcontractor in the absence of the subcontractor's failure to secure compensation under the Act?

**LIST OF PARTIES**

1. Joe Rosetti, Petitioner
2. Judy M. Guice, Counsel for Petitioner
3. Paul S. Minor, Counsel for Petitioner
4. Minor and Benton, Counsel for Petitioner
5. Avondale Shipyards, Inc., Respondent
6. Nelson W. Wagar, III, Counsel for Respondent
7. Hailey, McNamara, Hall, Larmann & Papale,  
Counsel for Respondent

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**PETITION FOR A WRIT OF CERTIORARI**

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**REFERENCES TO OFFICIAL REPORTS OF  
OPINIONS DELIVERED IN THE COURTS BELOW**

The Fifth Circuit Court of Appeals rendered two opinions in this case, both of which are pertinent to a review of the issues presented by this Petition for Certiorari. These opinions are reported as follows: *Hall v.*

*Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied sub. nom. Avondale Shipyards, Inc. v. Rosetti*, — U. S. —, 106 S.Ct. 69, 88 L.Ed.2d 56 (1986), and *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir. 1987).

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**STATEMENT OF GROUNDS UPON WHICH  
JURISDICTION OF THE UNITED STATES  
SUPREME COURT IS BEING INVOKED**

On November 5, 1985, the Eastern District of Louisiana granted Defendant's Motion for Summary Judgment and entered Judgment thereon. A Notice of Appeal was timely perfected to the Fifth Circuit Court of Appeals, which affirmed the judgment of the lower court on July 16, 1987.

This Writ of Certiorari is presented under the discretionary jurisdiction of the Court. 28 U.S.C. 2101(c). This discretion should be exercised in the case based upon the hopeless conflict existing among the circuit courts of appeals concerning the rights of shipbuilders to the negligence remedy provided in 33 U.S.C. Section 905(b).

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**STATUTES INVOLVED IN THIS CASE**

1 U.S.C. Section 3:

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

## 33 U.S.C. Section 902(21):

The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers an injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charterer, or bare boat charterer, master, officer, or crew member.

33 U.S.C. Section 904(a)<sup>1</sup>:

Every employer shall be liable for and secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this Title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if his contractor has provided insurance for such compensation for the benefit of the subcontractor.

33 U.S.C. Section 905(a)<sup>2</sup>:

Liability of an employer prescribed in section 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law in admiralty for damages on account of such injury or death. In such action, the

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<sup>1</sup>As amended in 1984, which amendment is applicable to the present case as it was pending on the date of enactment.

<sup>2</sup>See Footnote 1.

defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904.

33 U.S.C. Section 905(b)<sup>3</sup>:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this Title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel.

If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or breach thereof at the time the injury occurred. The remedy provided in this

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<sup>3</sup>As the 1984 amendments to 905(b) apply only to injuries sustained after enactment of the amendments, the pre-1984 statute is quoted.

subsection shall be exclusive of all other remedies against the vessel except remedies available under this Chapter.

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### **STATEMENT OF THE CASE**

Plaintiff, Joe Rosetti, a pipefitter employed by Universal Systems, Inc., was injured on March 2, 1981, aboard the OGDEN I at Avondale Shipyards in Avondale, Louisiana. At the time of his injury, the OGDEN I was afloat on navigable waters and was 80-97% complete.

As a result of his total and permanent disability, Plaintiff has received compensation benefits under the Longshore and Harbor Workers' Compensation Act from his employer, Universal Systems, Inc., from the time of his injury to the present.

These lengthy proceedings, encompassing two appeals to the Fifth Circuit Court of Appeals, commenced on March 1, 1982, when Plaintiff, a Mississippi resident, filed his Complaint against Avondale Shipyards, Inc., a Louisiana corporation, in the Eastern District of Louisiana for causes of action arising under 33 U.S.C. Section 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. (1972).

At the instruction of the District Court Judge, Defendant filed a Motion for Summary Judgment on August 3, 1983, on several grounds, including the contention that because the OGDEN I was incomplete at the time of Plaintiff's injury it was not a "vessel" and therefore Plaintiff had no cause of action against Defendant under

the LHWCA. This Motion for Summary Judgment was granted on August 19, 1983, on the ground that the OGDEN I, being under construction and less than 100% complete, was not a "vessel", and thus maritime jurisdiction did not exist.<sup>4</sup> The lower court also held that Plaintiff was Avondale's borrowed servant and, accordingly, could not assert a state law tort claim against it.

On appeal to the Fifth Circuit Court of Appeals, the case was consolidated with *Hall v. Hvide Hull No. 3* (5th Cir. No. 83-3471) and *Dang v. Avondale Shipyards, Inc.*, (5th Cir. No. 83-3580), both of which involved grants of summary judgment by the same District Court Judge on grounds that the vessels involved in each case were incomplete. On November 15, 1984, the Fifth Circuit Court of Appeals vacated and remanded all three (3) cases. See, *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984).<sup>5</sup> In a cogent 12-page opinion, the Fifth Circuit held that a floating hull, capable of being used for transportation on water, was a vessel for purposes of Section 905(b), relying both upon the definition of vessel contained in the LHWCA, 33 U.S.C. Section 902(21), and the general code definition of "vessel" contained in 1 U.S.C. Section 3. *Hall*, 746 F.2d at 299.

The Fifth Circuit likewise held that federal admiralty jurisdiction was presented by the consolidated actions for injuries upon hulls under construction and floating in navigable waters. *Hall*, 746 F.2d at 300. As to the present case, however, the Fifth Circuit noted that the jurisdic-

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<sup>4</sup>See, Reasons for Judgment reproduced in Appendix at A-38.

<sup>5</sup>Reproduced in Appendix at A-1.

tional finding was unnecessary, inasmuch as federal diversity jurisdiction existed. *Hall*, 746 F.2d at 305. Petitions for Rehearing and Rehearing En Banc before the Fifth Circuit Court of Appeals were denied, as was Avondale's Petition for Writ of Certiorari. 106 S.Ct. 69, 88 L.Ed.2d 56 (1986).

At the pretrial conference held in this case after remand by the Fifth Circuit, the trial judge again advised counsel for Defendant to file another Motion for Summary Judgment to include assertions that Defendant's negligence constituted shipbuilder negligence, excludible under 905(b). The second Motion for Summary Judgment did not reurge the grounds relied upon by the lower court in granting the first Motion for Summary Judgment, i.e., that the vessel was incomplete. The Motion for Summary Judgment was again granted by the lower court, this time based upon shipbuilder negligence.<sup>6</sup>

Plaintiff again appealed to the Fifth Circuit Court of Appeals. Defendant at no time during the second appeal argued that summary judgment was proper because the vessel was incomplete. In fact, the status of the OGDEN I was neither briefed by the parties nor addressed in oral argument.

Instead of addressing the soundness of the district court's ruling in granting the second Motion for Summary Judgment, the Fifth Circuit, without notice to Plaintiff, reversed its holding of the first appeal and determined that, because it was incomplete, the OGDEN I was not a "vessel" under 905(b). *Rosetti v. Avondale Shipyards*,

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<sup>6</sup>See Appendix at A-41.

*Inc.*, 821 F.2d 1083 (5th Cir. 1987).<sup>7</sup> Relying upon *Richendollar v. Diamond M Drilling Co.*, 819 F.2d 124 (5th Cir. 1987) (en banc),<sup>8</sup> the court held that the statutory definition of "vessel" in the LHWCA may not be used as the basis for the definition of "vessel" under Section 905(b) of the Act. Because, as stated by the Fifth Circuit, the OGDEN I was not a vessel for purposes of admiralty jurisdiction, it likewise could not be a vessel for purposes of a 905(b) vessel negligence claim.

As to Plaintiff's state law tort claim, the Fifth Circuit held that such claim was foreclosed based upon the borrowed servant doctrine, notwithstanding the 1984 amendments to the LHWCA that preclude a contractor, such as Avondale, from being deemed the employer of a subcontractor's employee, such as Plaintiff, unless the subcontractor fails to make compensation payment, under the Act. 33 U.S.C. Section 905(a) (1984).

Because of the serious and farreaching implications of the Fifth Circuit's decision, and because it is in conflict with the decision of another federal court of appeals on the same matter,<sup>9</sup> as well as in conflict with a decision

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<sup>7</sup>Reproduced in Appendix at A-25.

<sup>8</sup>Because the *Richendollar* holding is crucial to an understanding of the court's decision in this case, it is reproduced in the Appendix at A-30.

<sup>9</sup>See, *McCarthy v. THE BARK PEKING*, 716 F.2d 130 (2d Cir. 1983), cert. denied sub. nom. *South Street Seaport Museum v. McCarthy*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984), and *Eagle-Picher Industries, Inc. v. United States*, 657 F.Supp. 803 (E.D.Pa. 1987), both of which are discussed *infra*.

of this Court,<sup>10</sup> Plaintiff requests that this Honorable Court grant review and reverse.

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## ARGUMENT

- A. Since the OGDEN I meets the statutory definition of "vessel" contained in the LHWCA, as well as the general code definition of "vessel", the OGDEN I was a "vessel" and Plaintiff may assert a negligence action against Defendant under Section 905(b) of the LHWCA.**

The issue presented by this Petition is one which has generated a great deal of controversy and disagreement among the inferior federal courts. The extent of this disagreement is perhaps best demonstrated by the two appeals which emanated from the case presented here for review and which reached directly conflicting results. Thus, an analysis of these cases is in order.

In the first appeal of this action, reported as *Hall v. Hvide Hull No. 3*<sup>11</sup>, the court framed the issue as follows: "whether a hull, floating on navigable waters during ship-building construction is a vessel for purposes of a tort action authorized by Section 5(b), 33 U.S.C. Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act." 746 F.2d at 296. The court's ultimate deter-

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<sup>10</sup>*Director, Office of Workers' Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297, 103 S.Ct. 634 (1984).

<sup>11</sup>746 F.2d 294 (5th Cir. 1984) cert. den. sub. nom. *Avondale Shipyard Inc. v. Rosetti*, — U.S. —, 106 S.Ct. 69, 88 L.Ed.2d 56 (1986).

mination of this issue required the analysis of two subsidiary questions, *viz.*, whether such a floating structure was, in fact, a vessel, and, if a vessel, whether an action brought by a shipbuilder injured thereon was cognizable under federal admiralty jurisdiction.

In ruling that the floating hulls were indeed vessels, the *Hall* court relied upon prior circuit precedent which had concluded that the Act's definition of vessel<sup>12</sup> required a finding that "incomplete ships upon which [covered] employees are working at a site [within] the coverage of the Act . . . are vessels" under the LHWCA. *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981). However, the Fifth Circuit did not base its decision solely on *Lundy*. Instead, it further analyzed the "vessel" issue in light of the definition of vessel in Title I (General Provisions), Chapter 1 (Rules of Construction), of the United States Code:

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. Section 3.

In analyzing the OGDEN I in conjunction with this definition, the *Hall* court aligned itself with the Second Circuit Court of Appeals in concluding that "a waterborne structure *capable* of being used for water transportation, even if only while towed," is a vessel within the meaning of the Code definition. *Hall, supra*, at 299, discussing *McCarthy v. THE BARK PEKING*, 716 F.2d 130, 134-35 (2d

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<sup>12</sup>33 U.S.C. Section 902(21), quoted *supra*, at 3.

Cir. 1983), *cert. denied sub. nom. South Street Seaport Museum v. McCarthy*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984), *rehearing denied*, 466 U.S. 994, 104 S.Ct. 2378, 80 L.Ed.2d 850 (1984).<sup>13</sup>

Further finding that 905(b) expressly recognizes that a "person employed by the vessel to provide shipbuilding . . . services" may bring a negligence action against the vessel under that Section, and that general maritime law prior to the 1972 amendments permitted a shipbuilder to sue the vessel under general maritime negligence principles when injured aboard an incomplete vessel in navigable waters,<sup>14</sup> the *Hall* court concluded that a finding of vessel status was "consistent both with principles expressed by relevant jurisprudence of this court and with the statutory intent of 905(b)." *Hall, supra*, at 300.

Prior to the Fifth Circuit's second decision in this case, and the one here presented for review, no court disagreed with the Fifth Circuit's analysis and holding on the "vessel" issue. Such was not true, however, of the second issue involved in that appeal, namely whether federal admiralty jurisdiction existed for injuries upon a hull under construction, floating in navigable waters.

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<sup>13</sup>In addition to the Second Circuit, decisions from this Court as well as the lower federal courts have likewise adopted the Section 3 definition for use under the LHWCA. See, *Norton v. Warner Co.*, 321 U.S. 565, 571 n.4 (1943); *Burkes v. American River Transp. Co.*, 679 F.2d 69, 75 (5th Cir. 1982); *Bongiovani v. M.V. Stoomvaart-Motts "Ooftzee"*, 458 F.Supp. 602 (S.D.N.Y. 1978).

<sup>14</sup>*Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321 (1922); *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958-59 (5th Cir. 1971).

Notwithstanding prior Fifth Circuit precedent which suggested a contrary result<sup>15</sup>, the *Hall* court held that as Congress clearly intended the federal admiralty jurisdiction to extend to such an action, and since pre-1972 jurisprudence further allowed such actions, then federal admiralty jurisdiction is present:

We are further of the opinion that the language of 905(b) was intended to preserve maritime jurisdiction over such claims, which under pre-1972 judicial interpretations were considered to be maritime actions. We are thus unable to accede to the argument of the defendants that, even though their hull might under the statutory intent of 905(b) be considered a "vessel" against which a negligence action is recognized by 905(b), nevertheless, federal admiralty jurisdiction would not extend to a 905(b) action against such a vessel because a hull under shipbuilding construction bears no significant relationship to traditional maritime activity. We find no such distinction between a 905(b) cause of action in admiralty jurisdiction to have been Congressionally intended by the enactment of 905(b).

*Hall, supra*, at 300 (emphasis in original).

Since all three cases consolidated in *Hall* involved injuries occurring on a maritime situs, i.e., navigable waters, the question to be resolved by the Fifth Circuit, and with other courts who have wrestled with this issue, was whether *Executive Jet*<sup>16</sup> required that the tort also bear a significant relationship to traditional maritime activity.

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<sup>15</sup>*Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984); *Hollister v. Luke Constr. Co.*, 517 F.2d 920 (5th Cir. 1975).

<sup>16</sup>*Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

The Fifth Circuit decision in *Hall* that Plaintiff's remedies under the LHWCA were not affected by *Executive Jet* was based upon a prior decision by this Honorable Court directly so holding. *Director, Office of Workers' Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297, 320 n.29, 103 S.Ct. 634, 649 n.29 (1984).

In *Perini*, the Court referred to the LHWCA's legislative history and "jurisprudential interpretations over the course of decades" in reaching its conclusion that *Executive Jet* did not require limitation of admiralty jurisdiction in the context of the LHWCA remedy. *Id.*

While the Fifth Circuit in *Hall* concluded that the federal admiralty jurisdiction issue was not present in the case *sub judice* by virtue of the parties' diversity,<sup>17</sup> the First Circuit Court of Appeals, in a decision rendered prior to the Fifth Circuit decision for which review is sought, concluded that in order to be cognizable under 905(b), the test for admiralty jurisdiction must be satisfied, regardless of the actual basis for jurisdiction. *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985) *cert. denied*, 476 U.S. —, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986).<sup>18</sup> In rejecting the Fifth Circuit's analysis and conclusion in *Hall*, the First Circuit in *Drake* framed the issue as follows:

Does 905(b) recognize only maritime torts, *i.e.*, torts cognizable in admiralty (regardless of the actual basis of jurisdiction, such as diversity), or does its range

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<sup>17</sup>*Hall*, at 305.

<sup>18</sup>See also, *In Re: All Maine Asbestos Litigation*, 772 F.2d 1023 (1st Cir. 1985) *cert. denied*, 476 U.S. —, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986).

encompass nonmaritime torts occurring *on* a vessel but where the tests for admiralty jurisdiction are not satisfied? After careful study, we think the scope of 905(b) is limited to maritime torts.

*Id.*, at 1012.

The First Circuit concluded that a maritime tort was not presented by injuries to shipbuilders and repairmen exposed to asbestos products because of the failure to meet the "nexus" test of *Executive Jet*. The *Hall* opinion was criticized as creating an "unusual rule in law, logic, legislative history [and] policy." *Id.*, at 1018.

In addition, the First Circuit found insignificant this Court's opinion in *Perini*, and the Fifth Circuit's reliance thereon, inasmuch as the issue presented in *Perini* concerned the compensation remedy available under 905(a), and not the maritime tort remedy available under 905(b). *Id.*<sup>19</sup>

Faced with the directly conflicting decisions of *Drake* and *Hall*, the Eastern District of Pennsylvania was confronted with this issue in *Eagle-Picher Industries, Inc. v. United States*, 657 F.Supp. 803 (E.D.Pa. 1987).<sup>20</sup> The district court adopted the Fifth Circuit decision in *Hall* based upon *Perini's* finding that *Executive Jet* was inapplicable to an interpretation of the scope of the LHWCA. The district court further concluded that the First Circuit had too easily disposed of *Perini* by its statement in *Drake* that the decision was concerned only with compensation.

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<sup>19</sup>Justice White dissented from a denial of certiorari in *Drake*. See, 476 U.S. —, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986).

<sup>20</sup>Appeal pending, No. 87-1361 (3rd Cir. 1987).

In this regard, the district court of Pennsylvania noted as follows:

The history of another case arising in the waters off Manhattan makes plain that the Court does not endorse as narrow a reading of *Perini* as the one the First Circuit has articulated. That other case was a 905(b) suit brought by Craig McCarthy, who was injured while painting the main mast of defendant "THE BARK PEKING", a stationary museum ship.

*Id.*, at 813-14, referring to *McCarthy v. THE BARK PEKING*, 716 F.2d 130 (2d Cir. 1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760, *rehearing denied*, 466 U.S. 994, 104 S.Ct. 2378, 80 L.Ed.2d 850 (1984).

In *McCarthy*, the Second Circuit Court of Appeals initially affirmed dismissal of plaintiff's 905(b) claim holding that plaintiff was not engaged in maritime employment within the meaning of the LHWCA since the museum ship upon which he worked had not been put to sea in 50 years and there was no intention to return the ship to active navigation.<sup>21</sup> McCarthy's Petition for Certiorari was granted by the Supreme Court 13 days after its decision in *Perini*, by entry of the following order:

82-53 *McCarthy v. THE BARK PEKING*. The Petition for a Writ of Certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Director, Office of Workers' Compensation Programs, United States De-*

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<sup>21</sup>*McCarthy v. THE BARK PEKING*, 676 F.2d 42, 45 (2d Cir. 1982).

*partment of Labor v. Perini, North River Association.*<sup>22</sup>

The subsequent Second Circuit opinion concluded that *Perini* mandated a finding that McCarthy was covered by the LHWCA and THE BARK PEKING was a "vessel" thus permitting an action for damages under 905(b):

We conclude that McCarthy now must be considered to have been engaged in "maritime employment" at the time he was injured on THE BARK PEKING. . . . He was "injured on the actual navigable waters in the course of his employment on those waters . . . " [*Perini*], 459 U.S. at 324 [103 S.Ct. at 650]. Under this latest Supreme Court decision, no more is required to qualify McCarthy as a statutory "employee."

*McCarthy*, 716 F.2d at 132-33. This Court denied certiorari.<sup>23</sup>

Inasmuch as McCarthy, a painter on a museum ship was engaged in "maritime employment" so as to permit an action under 905(b), the Eastern District of Pennsylvania likewise concluded that shipyard workers' claims for negligence were cognizable under 905(b).

Having analyzed the prior conflicting precedent, we now consider the Fifth Circuit's action in the present case. *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir. 1987). Instead of engaging in the extensive analysis seen in *Hall, Drake, McCarthy*, and *Eagle-Picher, the Rosetti* court, in less than a page of discussion, summarily

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<sup>22</sup>*Id.*, at 14, quoting *McCarthy*, 716 F.2d at 131; see, 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983).

<sup>23</sup>456 U.S. 1098, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984).

concluded that the unfinished OGDEN I was not a vessel for purposes of maritime jurisdiction and, therefore, was not a vessel for purposes of a 905(b) vessel negligence claim.

In so holding, *Rosetti* relied solely upon the Fifth Circuit's *en banc* decision rendered one month prior to the *Rosetti* decision in *Richendollar v. Diamond M Drilling Co., Inc.*, 819 F.2d 124 (5th Cir. 1987) (*en banc*).

The four-page *Richendollar* opinion, while not expressly overruling *Hall*, held that the *Executive Jet* nexus requirement was necessary in order to maintain a 905(b) action, that the statutory definition of vessel in the LHWCA may not be used as the basis for the definition of vessel under 905(b), and that in order to constitute a vessel under 905(b), the structure must be a vessel for purposes of admiralty jurisdiction.<sup>24</sup>

Neither *Richendollar* nor *Rosetti* discussed the decisions of *Perini*, *Drake*, *McCarthy*, or *Eagle-Picher*, nor do these decisions discuss the statutory definitions of a "vessel" found in 33 U.S.C. 902(21) or 1 U.S.C. 3. Moreover, neither *Rosetti* nor *Richendollar* attempt to reconcile 905(b)'s express allowance of a negligence action by a shipbuilder with their holdings that an incomplete ship is not a "vessel" under 905(b). Perhaps most important, although *Richendollar's* holding was limited to an injury to a shipbuilder working on a structure on *land* and not yet launched, the Fifth Circuit held the decision to be totally applicable to the present case, involving injuries aboard a floating vessel on navigable waters.

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<sup>24</sup>Petition for Certiorari is pending in *Richendollar*, No. 87-504.

In so doing, the court failed to recognize distinctions long ago noted by this Court between a vessel before and after she is launched. In short:

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching, she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house. . . . In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction.

*Tucker v. Alexandroff*, 183 U.S. 424, 438, 22 S.Ct. 195, 201, 46 L.Ed. 264 (1902).

As shown by the above, the lower courts are in hopeless conflict on the issue of admiralty prerequisites necessary for a 905(b) claim. While the First and Fifth Circuits deny a 905(b) remedy under the circumstances here presented, the Second Circuit and the Eastern District of Pennsylvania allow such an action. Moreover, the lower courts sharply dispute the significance of this Court's decision in *Perini*. Petitions for Certiorari submitted to resolve this issue have been denied by this Honorable Court on at least four occasions.<sup>25</sup> At least one other Petition for Certiorari is presently pending, in addition to the present Petition.<sup>26</sup> Moreover, the issue continues to be presented to both district courts and courts of appeal.

It is respectfully submitted that because of this conflict in the circuits, this Honorable Court should grant this Petition for Certiorari to resolve this important issue.

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<sup>25</sup>See, *Hall, supra*; *McCarthy, supra*; *Drake, supra*; and *In Re: All Maine Asbestos Litigation, supra*.

<sup>26</sup>*Richendollar, supra*, No. 87-504.

**B. Because Plaintiff's employer and Avondale's subcontractor did not breach its obligation to secure compensation payments as required under the LHWCA, Avondale may not be deemed Plaintiff's employer under the borrowed servant doctrine or otherwise.**

In addition to holding that Plaintiff had no cause of action under 905(b), the Fifth Circuit affirmed the district court's dismissal of Plaintiff's state law tort claims against Avondale on the basis of the borrowed servant doctrine, under which an entity other than a worker's actual employer may be granted immunity from tort suit based upon the exclusive remedy provisions of worker's compensation. *See generally, Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977); *Hebron v. Union Oil Co.*, 634 F.2d 245 (5th Cir. 1981).<sup>27</sup> Plaintiff maintains that this action was directly contrary to the Congressional intent manifested by the 1984 amendment to Section 905(a) which states as follows:

For purposes of this subsection [exclusiveness of liability], a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.

33 U.S.C. 905(a) (1984).<sup>28</sup>

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<sup>27</sup>The question of Avondale's status as Plaintiff's employer likewise bears upon the propriety of the district court's action in granting summary judgment on the grounds that Plaintiff could not prevail on the merits of his 905(b) claim because, according to the district court, Avondale's negligence was "shipbuilder" negligence and not "owner" negligence. This limitation of recovery applies, of course, only when the shipbuilder is "employed by the vessel." 33 U.S.C. 905(b) (1972). As Plaintiff's injury occurred prior to the 1984 amendments to the Act, Congressional modification of 905(b) is inapplicable to this case.

<sup>28</sup>This amendment applies to the present case, as it was pending at the time of its enactment.

Since Plaintiff's employer did not fail to secure the payment of compensation as required by the Act, thus relieving Avondale of any responsibility for compensation benefits, then Avondale likewise should not be immune from a tort action. In this regard, it has been noted:

The statutory language is explicit, and it makes much more sense: only where an employer is liable for the compensation remedy provided by the Act is that remedy made exclusive against him for the employee's injuries. It makes no functional sense to hold that a contractor, immune under the Act from compensation remedy for injuries received by a subcontractor's employees, is nevertheless also entitled to tort immunity because of the exclusive nature of the compensation remedy accorded, not at all against the contractor, but solely against the subcontractor.

*West v. Kerr-McGee Corp.*, 765 F.2d 526, 533 (5th Cir. 1985) (Tate, dissenting).

Plaintiff maintains that by its action in rejecting an express Congressional mandate, the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision. In addition, the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Accordingly, Plaintiff would request that this Honorable Court grant his Petition for Certiorari to ~~review~~ this issue.

## CONCLUSION

In affirming the dismissal of Plaintiff's action, the Fifth Circuit, while previously allowing such an action, has aligned itself with the First Circuit Court of Appeals in denying the shipbuilder's right to bring a 905(b) action based on the negligence of a vessel under construction. In contrast, the Second Circuit Court of Appeals, under similar circumstances, has allowed such an action, as has the Eastern District Court of Pennsylvania. In addition, the lower federal courts are in disagreement as to the significance of this Court's opinion in *Perini, supra*. Certiorari on this precise issue has been denied by this Court on at least four occasions. Because of the lack of uniformity, a hopeless conflict exists in the courts of appeal and district courts concerning the availability of a 905(b) tort remedy to shipbuilders and other injured employees similarly employed.

In addition, the Fifth Circuit in holding Plaintiff to be Avondale's "borrowed servant" and thus immunizing Avondale from tort liability, has acted contrary to the Congressional intent of amending 905(a) of the Act to restrict the circumstances in which a contractor, such as Avondale, can be deemed the employer of a subcontractor's employees.

Because of the importance of the issues presented herein which have not been, but should be, settled by this

Court, Petitioner respectfully requests that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

JOE ROSETTI,  
Plaintiff/Petitioner

By: /s/ Judy M. Guice  
PAUL S. MINOR  
MINOR AND BENTON  
P. O. DRAWER 1388  
BILOXI, MS 39533  
601/374-5151

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1987

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JOE ROSETTI

Petitioner

VERSUS

AVONDALE SHIPYARDS, INC.

Respondent

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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APPENDIX



**APPENDIX**

Mrs. Amy HALL, Widow of Jose R. Duncan, Individually  
and as Natural Tutrix of the Minors, Alan Renaldo Duncan  
and Cindy Winkleth Duncan, Plaintiff-Appellant,

v.

HVIDE HULL NO. 3 and Avondale Shipyards, Inc.,  
Defendants-Appellees.

Thanh H. DANG, Plaintiff-Appellant,  
Fidelity & Casualty Co.,  
Intervenor-Appellant,

v.

AVONDALE SHIPYARDS, INC., et al.,  
Defendants-Appellees.

JOE ROSETTI, Plaintiff-Appellant,

v.

AVONDALE SHIPYARDS, INC.,  
Defendant-Appellee.

Nos. 83-3471, 83-3580 and 83-3607.

United States Court of Appeals, Fifth Circuit.

Nov. 15, 1984.

Appeals from the United States District Court for  
the Eastern District of Louisiana.

Before RUBIN, REAVLEY, and TATE, Circuit  
Judges.

TATE, Circuit Judge:

The central issue in these three appeals<sup>1</sup> is whether a hull, floating on navigable waters during shipbuilding construction, is a vessel for purposes of a tort action authorized by section 5(b), 33 U.S.C. § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. (hereinafter, "Longshoremen's Act"). The district court said "no". We reverse, on the basis of our decision in *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980), *reh. denied*, 629 F.2d 1349, *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981). The panel agrees that we are bound by *Lundy* and that, under the law of the circuit, it must be followed in the absence of en banc overruling. However, the panel also notes that an issue of banceworthy dimension may be presented by the conflict between *Lundy's* rationale and some expression in our more recent jurisprudence that an injury to ship construction workers on board a vessel under construction, although on navigable waters, is not a maritime tort, since ship construction is not a maritime business. See, e.g., *Lowe v. Ingalls Shipbuilding, A Division of Litton*, 723 F.2d 1173, 1185, 1187 (5th Cir.1984).<sup>2</sup>

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1. All three of these cases were dismissed by the same district court after a hearing on a motion for summary judgment. All three were then consolidated on appeal.
  2. Thus, the defendants in two of the three cases, (see note 12 *infra*; diversity jurisdiction is present in the third appeal) urge that, even if we find the present floating hulls to be vessels for purposes of § 905(b), federal admiralty jurisdiction, the sole jurisdictional basis relied upon, is absent. If applied as controlling to the present facts, the *Lowe* principle would not only be in conflict with *Lundy* but also, arguably, with the rationale of other decisions of this and another circuit (to be cited in the text *infra*, accompanying notes 8-10).

The issues will be discussed as follows: I. The *Lundy* holding and its rationale; II. Federal admiralty jurisdiction of a § 905(b) action for injuries upon a hull that is under construction and floating in navigable waters; and III. Facts and issues peculiar to each of the three appeals.

I. *The Lundy holding and its rationale.*

In each of the present three suits, an employee admittedly within the coverage of the Longshoremen's Act was injured or killed at work on a floating hull from, variously, 70-90% completed. In each suit, the employee or his survivors brought suit against the vessel or its owner to recover damage that allegedly resulted from the defendant's negligence.

The Longshoremen's Act, as amended in 1972, permits a person covered by the Act to recover tort damages for injuries resulting from the negligence of a vessel. 33 U.S.C. § 905(b).<sup>3</sup> All parties concede that the employees

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3. Section 905(b) reads in its entirety:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship-

(Continued on following page)

in question were covered by the Act at the time of their injury or death.<sup>4</sup> The defendants dispute, however, that a "vessel"<sup>5</sup> was involved in the respective work accidents.

In *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir.1980), *reh. denied*, 629 F.2d 1349, *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981), the plaintiff, Lundy, a person covered by the Longshoremen's Act, fell through an escape hatch while working aboard the USS Hewitt. When the accident occurred, the USS Hewitt was 97% complete, was being prepared for sea trials, and had an assigned crew. Lundy sued his employer, as owner

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*building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.*

(Emphasis added.)

4. Coverage applies to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or a member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. § 902(3).
5. The term "vessel" is defined by the Act as "any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bareboat charterer, master, officer, or crew member." 33 U.S.C. § 902 (21). See also, however, 1 U.S.C. § 3 (defining "vessel") and discussion in text *infra* slip op. at 799, at — F.2d — et seq.

of the ship, for damages resulting from negligent injury under, inter alia, § 905(b). The district court dismissed Lundy's claim, holding that an incomplete ship is not a vessel for purposes of § 905(b). We reversed, holding

The definitional section of the LHWCA provides that "[t]he term 'vessel' means any vessel upon which or in connection with which a person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment . . . " 33 U.S.C.A. § 902(21) (West 1978). Persons entitled to benefits under the LHWCA are "employees." See id § 903(a). "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." Id. § 902(3). We have previously held that "[s]hipbuilders who do the initial work to construct a vessel for launching are just as engaged in shipbuilding as those who are completing the task after something is finished which can be called a ship." *Ingalls Shipbuilding Corp., Division of Litton Systems, Inc. v. Morgan*, 551 F.2d 61 (5th Cir.1977). Thus, incomplete ships upon which 33 U.S.C. § 902(3) employees are working at a site which [is within] the coverage of the Act, 33 U.S.C. § 903, are vessels within the meaning of 33 U.S.C. § 902(21). The USS Hewitt was thus moored to the statute.

624 F.2d at 592.

In the panel's view, the rationale and holding in *Lundy* represent controlling precedent in this circuit and require reversal of the summary judgments granted in the three appeals before us, insofar as they are based upon the district court's appreciation that the floating hulls in the three present cases could not be vessels because uncompleted. *Lundy's* characterization of the hull in that case

as a vessel for § 905(b) purposes rested directly upon its holding that the incomplete ship afloat was a "vessel" within the statutory meaning of the Longshoremen's Act.

[1] The application of *Lundy* to the present facts, thus, cannot be respectably distinguished, as argued, simply because the present floating hulls were only, respectively, 75-90%, 70%, and 80-85% complete, instead of, as in *Lundy*, 97% complete. The floating hulls in the present cases, equally to that in *Lundy*, were "capable of being used as a means of transportation on water", 1 U.S.C. § 3, and were thus likewise "vessels" for the purposes of the Longshoremen's Act. *Burks v. American River Transportation Company*, 679 F.2d 69, 75 (5th Cir.1982).

Furthermore, to anticipate II *infra*, in *Lundy* the sole basis of federal jurisdiction asserted for this § 905(b) action was the admiralty jurisdiction.<sup>6</sup> The *Lundy* panel rejected (although without express comment) contentions of the defendant therein, similar to those that are presently advanced, that an action for negligent injury to a ship-building employee could not be brought in federal court against the uncompleted vessel within the ambit of § 905(b) because the injury did not arise from a maritime tort.<sup>7</sup> In-

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6. The court's opinion does not explicitly mention the basis for jurisdiction. However, we have reviewed the briefs filed on appeal in *Lundy*, and they indicate no other basis for jurisdiction.

7. In *Lundy*, we thus rejected the following argument made by the vessel owner in its appellate brief at pp. 12-13:

In *Walter v. Marine Office of America*, [537 F.2d 89 (5th Cir.1976)], this Court said:

(Continued on following page)

deed, the *Lundy* defendant relied in part upon *Hollister v. Luke Construction Company*, 517 F.2d 920 (5th Cir.1975), the same decision relied on heavily by the present defendants, see II *infra*. *Lundy's* application to the present facts, thus, cannot be distinguished on a jurisdictional basis either.

*Lundy's* definition of a floating hull as a vessel for purposes of § 905(b) is consistent with our decision in *Burks v. American River Transportation Company*, 679 F.2d 69 (5th Cir.1982) and with the definition of vessel in

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" . . . Traditionally contracts for the construction of a ship are not ordinarily within the Article III maritime and admiralty jurisdiction."

[537 F.2d 94].

In *Hollister v. Luke Construction Co.*, [517 F.2d 920 (5th Cir.1975)], this Court said: ". . . The fact that the barge here was only partially completed at the time of plaintiff's injury is thus dispositive of his claim based on Luke's alleged maritime negligence. See *Garcia v. American Marine Corp.*, *supra*, 432 F.2d [6] at 7 [(5th Cir.1970)]; *Alfred v. M/V MARGARET LYKES*, *supra*, 398 F.2d [684] at 685, [(5th Cir.1984)]. The district court correctly granted summary judgment on that claim as well as on the others."

[517 F.2d 921, 922]

Appellant suggests in his brief that this Court should extend the doctrine of *Smith v. M/S The Captain Fred*, *supra*, to allow a third-party action to be brought by the appellant against his employer and a co-employee on the theory that the incompleted ship was a vessel under the doctrine of *Reed v. The Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963). *Smith v. M/S The Captain Fred*, *supra*, dealt with injuries suffered by a repairman onboard the vessel. In this case [*Lundy*] there was no completed vessel, and the appellant's injury was not sustained aboard a completed vessel, nor resulted from the negligence of a completed vessel.

Title 1 (General Provisions), Chapter 1 (Rules of Construction), of the United States Code:

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3.

In *Burks, supra*, 679 F.2d at 75, we held that this code definition provides the meaning of vessel "as that term is used in the LHWCA [Longshoremen's and Harborworkers' Act]." That a waterborne structure is "*capable of being used for transportation on water*" (emphasis the court's) is, thus, the test. *Id.* In *Burks*, the court further indicated that a harbor worker on a vessel so defined would have a § 905(b) negligence action for injury thereupon, 679 F.2d at 76.<sup>8</sup>

The Second Circuit, by a similar rationale, likewise recognized the principle that, for purposes of the Longshoreman's Act, a hull is a vessel if, even though not self-powered, it is capable of being towed on the water. In *McCarthy v. The Bark Peking*, 716 F.2d 130, 133-34 (2d Cir.1983), *cert. denied sub. nom. South Street Seaport Museum v. McCarthy*, — U.S. —, 104 S.Ct. 1439, 79 L.Ed 2d 760 (1985), the issue was whether an employee covered by the Longshoremen's Act was injured as the result "of

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8. However, the *Burks* claimant had lost his negligence action in the trial court, and did not urge that point on appeal. 679 F.2d at 76.

The court had previously noted that the claimant therein was not a member of the crew (see note 10 *infra*) of the watercraft on which injured and that, by reason of the 1972 amendments, he had no unseaworthiness cause of action. *Id.*

the negligence of a *vessel*' within the meaning of § 905(b)'' , 716 F.2d at 133 (emphasis added), and thus entitled to bring an action against the vessel under § 905(b) for its negligent injury to the plaintiff employee. The ship on which the employee was injured was a floating museum vessel, which, rudderwelded, had not put to sea under its own power for half a century, and which was not susceptible to use as a self-navigating craft (although capable of being towed). The vessel defendants contended that the plaintiff employee could not avail himself of a § 905(b) remedy because this ship allegedly could not be considered a vessel within the meaning of the Longshoremen's Act.

The Second Circuit rejected the defendant's contention. Relying on our decisions in *Burk* and *Lundy*, cited above, the Second Circuit held that the ship in question met the test of being a vessel, since it was "*capable of being used as a means of transportation on water*" within the statutory definition provided by 1 U.S.C. § 3. *Id.*, 716 F.2d at 134.<sup>9</sup> The court, additionally, pointed out uniform jurisprudence by which, under this test, a waterborne structure *capable* of being used for water transportation, even if only while towed, could be considered a vessel. *Id.*

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9. Referring to a relevant rule of statutory construction, the Second Circuit stated:

Since Congress, in its use of the term 'vessel' in 902(21) and 905(b), did not provide a definition different from the generally acknowledged one found in section 3, we may presume, as other courts have, that it intended to adopt this commonly-used term. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 952-53 (7th Cir. 1979), *aff'd*, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980). (footnote omitted).

*McCarthy, supra*, 716 F.2d at 134.

716 F.2d at 134-35.<sup>10</sup> The court also noted that the 1972 amendments to the Longshoremen's Act had been held "to be broadly inclusive." *Id.*, 716 F.2d at 133.

By this test, all three hulls in the present cases were vessels for purposes of a § 905(b) action. They had been launched and were afloat in navigable waters, although moored to the shore.

By its terms, §905(b), enacted by the 1972 revision of the Act, recognizes that an Act-covered employee injured while working on an uncompleted vessel is entitled to assert a negligence action against it or its owner. The statutory section also recognizes that a "person employed by the vessel to provide shipbuilding . . . services" may bring a negligence action against the vessel (*except* where the injury results from the negligence of persons engaged in providing shipbuilding or repair services. *See* note 2 *supra* (quoting § 905(b) in full)). Prior to the 1972 amendments of the Act, "[a] shipbuilder's worker . . . assisting in the building and ultimate commissioning of a launched but uncompleted vessel floating or maneuvering in navigable waters" had been held to be entitled under general maritime negligence principles to sue the vessel or its owner for injuries sustained while on the uncompleted

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10. Whether the "vessel" was also "in navigation", so as to present a Jones Act situs (or so as to constitute a waterfront employee "a master or member of a crew of any vessel", 33 U.S.C. § 902(3), who would thus be excluded from coverage by the Longshoremen's Act), presents a different issue, one that is not involved in the present actions. *See, e.g., Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971) (a cutter on the water under final sea trial was not a vessel in navigation for purposes of Jones Act coverage, but nevertheless a maritime tort action might be available to a person injured on it).

vessel in navigable waters. *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958-59 (5th Cir.1971).<sup>11</sup> For reasons to be set forth more fully in part II *infra*, the statutory language of § 905(b) in this regard was intended, in our opinion, to preserve maritime jurisdiction over the shipbuilder's cause of action against a floating vessel under construction that had been previously recognized by decisions such as *Williams*.

Thus, *Lundy's* rationale and holding—controlling as to the three cases now before us—is consistent both with principles expressed by relevant jurisprudence of this court and with the statutory intent of § 905(b).

II. *Federal admiralty jurisdiction of a § 905(b) action for injuries upon a hull under construction, which is floating in navigable waters.*

For reasons to be stated more fully, we also find that *Lundy's* holding is consistent with prior jurisprudential holdings and the Congressional intent, in its implicit finding that there is federal admiralty jurisdiction over § 905(b) actions brought by shipbuilders injured aboard partially constructed vessels floating on navigable waters.

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11. See, to similar effect, *Rogers v. M/V Ralph Bollinger*, 279 F.Supp. 92, 93 (E.D.La.1968):

A ship under construction, launched and lying in navigable waters, but not yet completed, is not a vessel in navigation. Hence a shipyard worker injured aboard it is not entitled to a warranty of seaworthiness. But it is afloat, and accidents happening on it occur on navigable waters. Therefore, the admiralty jurisdiction of this Court extends to tort claims arising from such accidents. Thus, insofar as the shipyard worker in this case is concerned, this Court has jurisdiction in admiralty of his claim that the owner of the vessel and the owner's officers were negligent. . . .

We are further of the opinion that the language of § 905(b) was intended to preserve maritime jurisdiction over such claims, which under pre-1972 judicial interpretations were considered to be maritime actions. We are thus unable to accede to the argument of the defendants that, even though their hull might under the statutory intent of § 905(b) be considered a "vessel" against which a negligence action is recognized by § 905(b), nevertheless, federal admiralty *jurisdiction* would not extend to a § 905(b) action against such a vessel because a hull under shipbuilding construction bears no significant relationship to traditional maritime activity. We find no such distinction between a § 905(b) cause of action and admiralty jurisdiction to have been Congressionally intended by the enactment of § 905(b).

However, we recognize that this holding is in conflict with expressions in at least two decisions of this circuit, which (although concerning distinguishable issues) indicated that federal admiralty jurisdiction did not extend to injuries on uncompleted vessels. Relying on these decisions, the defendants in two of the cases before us<sup>12</sup> argue that federal jurisdiction is lacking, on the principle we stated in *Lowe v. Ingalls Shipbuilding, A Division of Litton*, 723 F.2d 1173 (5th Cir.1984), that "an injury to a ship construction worker onboard a ship under construction and lying in navigable waters is not a maritime tort". *Id.* at 1187).

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12. *Hall v. Hvide Hull No. 3*, No. 83-3471; *Dang v. Avondale Shipyards*, No. 83-3580. In the third appeal before us, *Rosetti v. Avondale Shipyards, Inc.*, No. 83-3607, there was federal diversity jurisdiction.

*Lowe* did not cite *Lundy*, but in support of this principle relied upon the holding to this effect in *Hollister v. Luke Construction Co.*, 517 F.2d 920 (5th Cir.1975), which had been cited to the *Lundy* panel but ignored by it as noncontrolling. See text at notes 6 and 7 *supra*. *Hollister* had conceded the principle expressed in *Williams v. Avondale Shipyards, Inc.*, *supra*, 452 F.2d at 959—that an injury on a vessel (broadly defined as in 1 U.S.C. § 3) on navigable waters may give rise to a maritime negligence action—but distinguished it as inapplicable because “a tort arising out of work on a launched but incomplete vessel . . . lacks maritime flavor.” *Hollister*, *supra*, 517 F.2d at 921.

Without reference to the construction of the Longshoreman’s Act by *Lundy*, the *Lowe* panel construed the Supreme Court’s holding in *Executive Jet Aviation Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), reaffirmed in *Foremost Insurance Company v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), as providing that “where [under previous decisional law] the tort was previously maritime only because of situs, the activity being nonmaritime, *Executive Jet* now requires that the tort be considered nonmaritime.” *Lowe*, *supra*, 723 F.2d at 1187. *Lowe* indicated that, therefore, *Executive Jet* had overruled prior decisional law that had recognized as a maritime tort the negligence of an incomplete vessel, if afloat on navigable waters, that injured a construction worker aboard. 723 F.2d at 1185-1187.<sup>13</sup>

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13. The actual merit-issue in *Lowe* was whether a shipyard employer, covered by the Longshoremen’s Act, had an independent cause of action against an asbestos manufacturer

The decision in *Lundy*, which the panel finds to be directly applicable to and controlling of the present facts, is essentially inconsistent with the rationale of *Lowe* and *Hollister*, although consistent with our decision in *Burks v. American River Transportation Company* (1982), cited in part I *supra*. En banc resolution of the conflicting rationales may thus be necessary.

We should perhaps note, however, that *Lowe* and *Hollister* arose in a context distinguishable from the present. *Lowe* did not concern a § 905(b) action; rather, it was a declaratory judgment action to determine the indemnity rights of a shipyard employer against an asbestos manufacturer, with regard to the manufacturer's liability to the employer for longshoremen's compensation benefits which the shipyard employer had paid its employees contracting asbestosis during their employment. See note 13 *supra*. Similarly, *Hollister* can arguably be distinguished as not pertaining to a § 905(b) action, because there the injured employee himself denied Longshoremen's Act coverage and sought recovery only under the Jones Act and

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for the excess of compensation benefits (due under the Act to its asbestos-disabled employees) paid by the employer over the amounts received by the employees in settlement of their tort claims against the manufacturer. However, without reaching the merits of the claim, *Lowe* held that federal subject matter jurisdiction was not established, after rejecting several other federal-jurisdiction grounds advanced. In substance, *Lowe* stated that federal maritime law, upon which federal jurisdiction might be based, did not govern the right of the shipyard employer to recover against the manufacturer, since any injury caused by the manufacturer to the construction employees aboard the floating hulls would not under *Executive Jet* be a maritime tort.

the general maritime law (i.e., not as an employee covered by the Act asserting a maritime negligence claim preserved for him by § 905(b) of the 1972 amendments to the Act).<sup>14</sup>

More importantly, however, the central rationale of *Lowe* is not applicable to the Congressionally contemplated § 905(b) action by a shipbuilder injured on an uncompleted vessel afloat on navigable waters, which was considered at the time of enactment of § 905(b) in 1972 as a maritime action since arising on a navigable situs. *Lowe's* central rationale was that shipbuilding was a non-maritime activ-

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14. In fairness, we should note that *Hollister* relied upon two decisions of this circuit in which the panels *did* decide that issue. These decisions held that admiralty jurisdiction was absent for a tort to an employee arising out of work on a launched but incompleated vessel: *Garcia v. American Marine Transportation*, 432 F.2d 6 (5th Cir.1970) and *Alfred v. M/V Margaret Lykes*, 398 F.2d 684 (5th Cir.1968). *Garcia* relied solely upon *Alfred*, and *Alfred* relied primarily upon *Frankel v. Bethlehem-Fairfield Shipyard, Inc.*, 132 F.2d 634 (4th Cir. 1942), cert. denied, 319 U.S. 746, 63 S.Ct. 1030, 87 L.Ed. 1702 (1943), overlooking that, despite broad language, the issue actually decided in *Frankel* was whether a construction worker on such an incompleated vessel was a seaman, so as to have a Jones Act remedy. So far as we can ascertain, the jurisdictional holdings in *Alfred* and *Garcia* have not been cited or followed by any decision other than *Hollister*.

Indeed, their jurisdictional holdings are contrary to the controlling decisions of the Supreme Court and of this circuit. As *Lowe* itself states with regard to pre-1972 decisional law, although a ship construction worker was held to be engaged in a non-maritime activity, nevertheless, "even if the injured party was not engaged in maritime activity, the tort was maritime if it took effect on navigable waters. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321 (1922)." *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1186 (5th Cir.1984). See also *Burks v. American River Transportation Company*, 679 F.2d 69, 75-76 (5th Cir.1982); *Rogers v. M/V Bollinger*, 279 F.Supp. 92, 96 (E.D.La.1968) (Rubin, J.).

ity, so that therefore an injury sustained in such activity did not meet the test announced in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), that, even though an injury to an employee occurs over navigable waters, it is "also" necessary "that the wrong bear a significant relationship to traditional maritime activity." *Id.*, 409 U.S. at 268, 93 S.Ct. at 504. *Lowe's* rationale is of doubtful relevance to the present issues, because of its differences with the present cases in cause of action<sup>15</sup> and in the legal values of federalism there (not here) at issue.<sup>16</sup>

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15. The actual holding of *Lowe* was only that no maritime tort upon which federal admiralty jurisdiction could be founded was presented by the suit to determine a shipbuilding employer's claim of tortious liability to it of an asbestos manufacturer. Independent of any cause of action conferred by the Longshoremen's Act itself, the employer sought recognition of its right to require indemnification from the asbestos manufacturer for excess compensation payments made by the employer to its employees covered by the Act for asbestos-caused disability. See note 13. The concerns as to whether this cause of action represented a maritime tort are quite distinct, in our opinion, from the issue as to whether there is federal jurisdiction to entertain the suit of a shipbuilding worker negligently injured on navigable waters, traditionally viewed as a maritime tort.

16. In discussing the jurisdiction issue, the defendants here rely on a number of cases in addition to *Lowe*. See *Owens-Illinois v. United States District Court*, 698 F.2d 967 (9th Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), cert. denied, — U.S. —, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir.), cert. dismissed, — U.S. —, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983). See also *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir.1984). Each of these cases, however, can be distinguished on the same grounds that *Lowe* may be distinguished: none involves either a § 905(b) claim against a vessel or its owner, or a question about the scope of the

Of more central importance to rejecting the application of the *Lowe* rationale to the federal-jurisdiction issue now before us, however, is that the Supreme Court itself has held that the remedies of employees who are covered by the Longshoremen's Act and who are injured on navigable waters are not affected by *Executive Jet*. *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 320 n. 29, 103 S.Ct. 634, 649 n. 29 (1984). Thus, in effect, if injury to an Act-covered employee was considered to constitute a maritime tort prior to the 1972 amendments, then "the wrong [to him] bear[s] a significant relationship to traditional maritime activity," *Executive Jet*, *supra*, 409 U.S. at 268, 93 S.Ct. at 504, so as to meet this quoted "nexus" prong of the *Executive Jet* test for maritime-tort federal admiralty jurisdiction. (The present injury having occurred on the

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federal court's admiralty jurisdiction under the Longshoremen's Act. All are based on the alleged liability of a manufacturer for injuries sustained in connection with the manufacturer's asbestos products. Even more important, perhaps, all involve the delicate question whether the federal interest in an amphibious worker's personal injury claims is sufficiently strong to justify federal courts supplanting state law with the federal common law of admiralty. See *Harville*, *supra*, 731 F.2d at 786. This question is not relevant to the present facts. See text. As the Supreme Court noted in *Scindia Steam & Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 165 n. 13, 101 S.Ct. 1614, 1621 n. 13, 68 L.Ed.2d 1 (1981), "[i]t was anticipated . . . that questions arising in § 905(b) cases 'shall be determined as a matter of federal law.'" (quoting S.Rep. No. 92-1125, p. 12 (1972)). We know that "[o]ur regard for our federal system requires that we scrupulously confine federal admiralty jurisdiction to the precise limits defined by Congress." *Holland v. Sea-Land Service, Inc.*, 655 F.2d 556, 559 (4th Cir.1981). These sensitive values are not at issue in the present cases.

navigable waters, the “situs” test of *Executive Jet* is also here satisfied).

In *Perini, supra*, the Court specifically rejected the contention that *Executive Jet* (characterized as applicable to a “wholly fortuitous” maritime situs) required limitation of a remedy to amphibious workers injured on navigable waters—a remedy that was Congressionally contemplated by the 1972 amendments to the Longshoremen’s Act, in view of the absence of shown legislative intent to change prior jurisprudential interpretations so providing. 459 U.S. at 320 n. 29, 103 S.Ct. at 649 n. 29. In holding that the marine construction worker there involved, who was injured on actual navigable waters, was entitled to the Congressionally contemplated compensation remedy, the Court noted that he “was by no means ‘fortuitously’ on the water when he was injured”, and also referred to the Act’s legislative history and “jurisprudential interpretations over the course of decades” as affording a consideration by which *Executive Jet* did not apply so as to limit the remedy of an employee covered by the Act. *Id.*

Earlier, in describing the effect of the 1972 amendments to the Act, the Supreme Court in 1981 had noted that, while an Act-covered employee’s right to recover for the ship’s unseaworthiness was thereby abolished, nevertheless the Congressional intent was that “his right to recover from the shipowner for negligence was *preserved* in § 905(b), which provided a statutory negligence action against the ship.” *Scindia Steam & Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 165, 101 S.Ct. 1615, 1621, 68 L.Ed.2d 1 (1981) (emphasis added). Prior to the 1972 amendments to the Longshoremen’s Act, an employee covered by the Act clearly had a maritime tort remedy against

the vessel or its owner, when negligently injured by a vessel (broadly defined) that was afloat on navigable waters. *Lowe v. Ingalls Shipbuilding*, *supra*, 723 F.2d at 1185-86; *Burks v. American River Transportation Company*, 679 F.2d 69, 75-76 (5th Cir.1982); *Rogers v. M/V Gollinger*, 279 F.Supp. 92, 96 (E.D.La.1968) (Rubin, J.). See also *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 477-78, 42 S.Ct. 157, 159, 66 L.Ed.2d 321 (1922).

[2, 3] Under the Supreme Court's decisions in *Perini* and *Scindia*, *supra*, therefore, the Congressional intent of the 1972 amendments to the Longshoremen's Act, including that provided by § 905(b), was to preserve within the federal admiralty jurisdiction the traditional maritime tort remedy of an Act-covered employee for injuries caused by the negligence of a vessel, broadly defined, while on the navigable waters.<sup>17</sup> For purposes of federal admiralty jurisdiction, maritime connexity (*Executive Jet's* requirement that the injury be in a "traditional maritime activity") was, in effect, Congressionally so determined through Congressional acceptance, in the 1972 revision of the Longshoremen's Act, of pre-1972 traditional judicial determinations of the maritime character of the activity in-

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17. Indeed, we ourselves reached this general conclusion in *Parker v. Southern Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir.1976). Although we rejected the contention that § 905(b) created a new and independent federal tort remedy for an Act-covered employee who was injured on land, we there concluded, as to the Congressional intent of § 905(b), that "[w]ith respect to third party actions for negligence, the reasonable inference [to be drawn from the legislative history] is that the boundaries of maritime jurisdiction as defined under prior law . . . were neither expanded nor constricted by passage of the 1972 Amendments, but simply retained." *Id.*, 537 F.2d at 117 (emphasis added.).

volved in injuries to these amphibious workers. Thus, shipbuilding employees injured in constructing a vessel on navigable waters are regarded by § 905(b) as no less injured in a maritime employment than they were, before the enactment of § 905(b) in 1972, by the pre-1972 jurisprudence.

We therefore reject the defendants' contention that the present claims were not within the federal admiralty jurisdiction and should, therefore, be dismissed. Consequently, the showing made in each of the cases does not permit summary judgment excluding maritime tort recovery and federal admiralty jurisdiction as to their claims of negligent injury by a vessel under construction and upon the navigable waters.

### III. *Facts and issues peculiar to each of the three appeals.*

We now set forth briefly the facts of each of the three appeals, construed as required most favorably to the opponents of the summary judgments granted, and dispose of any issues peculiar to that appeal.

#### A.

##### *Hall v. HVIDE HULL NO. 3—No. 83-3471*

Jose R. Duncan died from exposure to argon gas on April 29, 1981. At that time, Duncan was employed by Avondale Shipyards, Inc. ("Avondale") and was working aboard the Hvide Hull No. 3, an Avondale hull floating in a wet-dock at the Avondale Shipyards on the Mississippi. Duncan's widow and two minor children sue both the Hvide Hull No. 3 and Avondale in its capacity as owner of the hull.

In deciding the defendant's motion for summary judgment, the district court found that, at the time of Duncan's death, the Hvide Hull No. 3 was only 75-90% complete, had no assigned crew, and had never undergone sea trials. With these findings in mind, the district court ruled that, when Duncan died, the Hvide Hull No. 3 was not a vessel within the terms of section 905(b) of the Longshoremen's Act and that no basis for jurisdiction existed under the general maritime law.

[4] As previously noted, *Lundy* requires reversal.<sup>18</sup>

### B.

#### *Dang v. Avondale Shipyards, Inc.—83-3580*

On or about July 12, 1978, Thanh H. Dang sustained injuries while working aboard the M/V El Paso Columbia, a tanker being constructed by Avondale pursuant to a con-

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18. The district court also found that Duncan's death, if it resulted from negligence at all, resulted from Avondale's negligence as shipbuilder, not as shipowner. The applicable language in section 905(b) provides that an action for "negligence of a vessel" cannot be brought "if the injury was caused by the negligence of persons engaged in providing shipbuilding or ship services to the vessel." 33 U.S.C. § 905 (b). According to the district court, this language provides an additional basis for dismissing the plaintiffs' suit. Dismissal on this ground upon the factual showings made at summary judgment stage was not warranted. Under § 905(b) a vessel owner also furnishing services to its vessel through Longshoremen's-Act-covered employees "is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." *Jones & Laughlin Steel Corporation v. Pfeiffer*, 462 U.S. 523, — n. 6, 103 S.Ct. 2541, 2547 n. 6 (1983). The facts in the case now before us were not sufficiently developed below for the district court to conclude by summary judgment that Avondale's negligence resulted from its activities as shipbuilder instead of as vessel owner. In short, the district court's conclusion regarding this issue was premature.

tract with El Paso Columbia Tanker Company ("El Paso"). At the time of Dang's accident, the M/V El Paso Columbia was floating in the Mississippi River and was held in place by a number of mooring lines. Following the accident, Dang filed two timely negligence actions against Avondale and El Paso.

[5] An issue as to whether Avondale was an owner of the vessel stems from a provision in the defendant's construction contract:

Title to the Vessel [The M/V EL PASO COLUMBIA], *to the extent completed* and title to all work and material performed upon or installed in the Vessel shall vest in the Purchaser [El Paso] . . . . The Contractor [Avondale] shall have an equity in such material and completed contract work in the Contractor's Shipyard and elsewhere to the extent that it has not been paid for by the Purchaser and to the extent that it is not incorporated in or installed on a *delivered* Vessel. (emphasis added).

The district court dismissed the two defendants for different reasons. It dismissed Avondale on the grounds that, according to the construction contract, Avondale was not a vessel owner and so could not be held liable for vessel-owner negligence in a tort action authorized by section 905(b). It dismissed El Paso on the grounds that, at the time of Dang's accident, the M/V El Paso Columbia was not a vessel within the terms of section 905(b), since at that time the tanker was only 70% complete, had no assigned crew, and had never had any sea trials.

Reversal of El Paso's dismissal is required by *Lundy*, see I above. Turning then to the dismissal of Avondale, we find that the district court erred in concluding that no

material facts are in dispute regarding Avondale's alleged ownership interest in the M/V El Paso Columbia. In our view, the relevant provision in the contract is ambiguous and is subject to factual parol evidence as to its intended meaning with regard to ownership of the vessel. A potential meaning susceptible of parol explanation is that, in fact, El Paso had only a security interest in the vessel and that its paper evidence to title was merely a disguised security interest to be held until the "completed contract work" was "delivered", not until such time would title be vested in El Paso. Another potential meaning of the contract is that the two parties were co-owners.

Therefore, on the face of the summary judgment showing, we are unable to conclude on the naked basis of the contract provision that no material issue of fact as to ownership is disputed, so as to permit summary judgment.

For purposes of this appeal, then, under the showing made in support of the motion for summary judgment, both Avondale and El Paso may be either an owner or a co-owner of the M/V El Paso Columbia, a vessel on navigable waters within the meaning of *Lundy*, and thus subject to 905(b) liability. *See I, supra*. We reverse the summary judgments in favor of these two defendants.<sup>19</sup> This does not preclude a contrary finding on the merits, or on later motion for summary judgment if the facts we have assumed are shown to be incorrect.

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19. The district court also found that, if Dang was injured by Avondale's negligence, he was injured by Avondale's negligence as shipbuilder, not as shipowner. On the basis of the facts herein thus far shown, summary judgment on this ground was not warranted. *See note 18 supra*.

## C.

*Rosetti v. Avondale Shipyards, Inc.—83-3607*

On or about March 2, 1981, Joe Rosetti, an employee of Universal Systems, Inc., sustained injuries while working aboard the Ogden 1, a hull floating in the Mississippi River and owned by Avondale. Following his accident, Rosetti filed this suit against Avondale as owner of the hull. Shortly thereafter, the defendant filed a motion for summary judgment.

In deciding the defendant's motion, the district court found that, at the time of Rosetti's accident, the Ogden 1 was still under construction: it was only 80-85% complete, was lacking most of its navigational equipment, had no operations crew, and had never undergone dock or sea trials. In light of these findings, the district court ruled that, at the relevant time, the Ogden 1 was not a vessel within the terms of section 905(b) of the Longshoremen's Act. Under *Lundy*, the district court erred.

Since the parties are diverse, federal jurisdiction has never been disputed. We therefore reverse.

## IV.

In light of the foregoing, we VACATE the district court's dismissals by summary judgment in all three of these consolidated cases, and we REMAND for further proceedings consistent with the views expressed herein.

VACATED AND REMANDED.

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Joe ROSETTI, Plaintiff-Appellant,

v.

AVONDALE SHIPYARDS, INC., Defendant-Appellee.

No. 85-3711.

United States Court of Appeals, Fifth Circuit.

July 16, 1987.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, REAVLEY, and JONES, Circuit Judges.

PER CURIAM:

This case is controlled by—and its decision has been deferred pending—our very recent en banc decision in *Richendollar v. Diamond M. Drilling Co.*, 819 F.2d 124 (en banc) [1987]. In *Richendollar*, this circuit expressly rejected the suggestion made in a previous disposition of this case, consolidated in *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir.1984), that “the pre-*Executive Jet/Foremost Insurance* test for a maritime tort was codified in § 905(b) by the 1972 amendments to the Longshore and Harbor Workers’ Act.” *Richendollar*, at 125. Because Rosetti was injured on an unfinished vessel at a shipyard, we hold, under *Richendollar*, that there was no “vessel” and thus no admiralty jurisdiction. We conclude that Rosetti cannot maintain his § 905(b) vessel negligence claim. Because of his status as a borrowed servant, he also is prohibited from maintaining any state law tort claim. We therefore affirm the decision of the District Court granting summary judgment for Avondale.

*In the Beginning*

This case has led a long and exceedingly unhealthy life. On March 2, 1981, plaintiff-appellant Rosetti was injured at defendant-appellee Avondale Shipyards' place of business. Rosetti's nominal employer was Universal Systems, Inc., a company engaged in supplying laborers. In day to day operations, however, Avondale exercised near total control over him in his job as a pipefitter. Since his injury, Rosetti has been paid his compensation benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA) by Universal Systems.

On March 1, 1982, Rosetti filed a suit against Avondale alleging maritime negligence under § 905(b) of the LHWCA, and simple tort negligence under state law. On August 19, 1983, the District Court granted Avondale's motion for summary judgment. The District Court held that the ship Rosetti was working on, the OGDEN I, was under construction at the time of his injury, and accordingly, was not a "vessel" for purposes of admiralty jurisdiction. The District Court also held that Rosetti was Avondale's borrowed servant, and therefore, was precluded from maintaining a state law tort claim against Avondale under *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir.1977).

On appeal, this case was considered with *Hall v. Hvide Hull No. 3*, and *Dang v. Avondale Shipyards, Inc.*, 746 F.2d 294 (5th Cir.1984), *cert. denied*, — U.S. —, 106 S.Ct. 69, 88 L.Ed.2d 56 (1986). All three cases were decided on summary judgment by District Judge Duplantier, who determined that the so-called vessels were "incomplete" for purposes of finding admiralty jurisdiction. On appeal, a

panel of this court vacated and remanded all three cases,<sup>1</sup> relying primarily on *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981). *Lundy* had used the statutory definition of "vessel" in the LHWCA as the basis for the definition of "vessel" under § 905(b), to find that a floating hull was "capable of being used as a means of transportation on water," 1.U.S.C. § 3, and thus was a "vessel" under the LHWCA. See *Burks v. American River Transp. Co.*, 679 F.2d 69 (5th Cir. 1982). The Court in *Hall* found this definition dispositive in deciding the jurisdiction question.

On remand, Avondale filed another motion for summary judgment. The second motion was granted on October 30, 1985. This time, the District Court held that Rosetti had failed to demonstrate a genuine controversy on the issue of vessel-owner negligence. Rosetti has appealed.

### *Is It a Ship Yet?*

[1] When Rosetti was injured, the OGDEN I was still under construction, being approximately 80% to 85% complete. Although the hull was afloat on navigable waters, the vessel itself was not navigable: the majority of the navigation equipment was not installed, dock trials and sea trials had not taken place, and no crew had been assigned to the vessel. Although the parties dispute to some degree just how complete the vessel was, Rosetti does concede that the OGDEN I was incomplete at the time of his injury.

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1. *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir.1984).

Accordingly, we are bound by this court's en banc pronouncement that "to be cognizable under § 905(b), a tort must occur on or in navigable waters . . . and there must be the traditional admiralty nexus. [I]n order for a waterborne structure to qualify as a 'vessel' under § 905(b), it must be a vessel for purposes of maritime jurisdiction. Such a vessel must be capable of navigation or its special purpose use on or in water." *Richendollar*, at 125.

Because we conclude that the unfinished OGDEN I was not a vessel for purposes of admiralty jurisdiction, it similarly cannot be a vessel for purposes of the § 905(b) vessel negligence claim. The en banc court put its imprimatur on Chief Judge Clark's dissent in the original panel opinion. *Richendollar v. Diamond M Drilling Co., Inc.*, 784 F.2d 580 (5th Cir.1986), in which he reasoned, "[t]he sine qua non of § 905(b) statutory liability for vessel negligence is the presence of a vessel which admiralty regards as a separate entity distinct from its owner." *Id.* at 589. There simply was no such "separate entity" yet. The OGDEN I had not reached such status, in the eyes of admiralty, at the time of Rosetti's injury.<sup>2</sup>

[2] As to Rosetti's state law tort claim, we agree that he is foreclosed from maintaining that action because of his status as a borrowed employee of Avondale's. By Rosetti's own admission, Avondale not only controlled, but had the right to control, virtually every aspect of his em-

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2. As we have emphasized often, § 905(b) has no effect on the reach of admiralty jurisdiction. It neither expands nor limits its availability. See *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir.1976), cert. denied, 430 U.S. 906, 97 S.Ct. 1175, 51 L.Ed.2d 582 (1977).

ployment, including all work, health, and safety rules, from checking in on an Avondale time clock, to being subject to termination by Avondale for any reason. Accordingly, Rosetti's status as a borrowed servant employed by Avondale operates under the LHWCA as a bar to Rosetti's state law negligence claim. Under the LHWCA, workers compensation is the exclusive remedy for an injured employee against his employer. See 33 U.S.C. §§ 904(a), 905(a) and 933(i); *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir.1977); see also *Hebron v. Union Oil Co.*, 634 F.2d 245 (5th Cir.1981). *Hebron* sets out the test for determining "borrowed servant" status as "the central question [is] whether someone has the power to control and direct another person in the performance of his work." *Id.* at 247. Since the record is substantially undisputed that Avondale exerted practical, near complete control over Rosetti, the District Court was entitled to grant summary judgment on the state based claim.

The voyage leading to the final conclusion in this case has been long and circuitous. Nevertheless, we feel confident that, this court en banc having spoken so forcefully and emphatically, we can without hesitation uphold the District Court's grant of summary judgment for Avondale.

AFFIRMED.

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Curtis Michael RICHENDOLLAR,

Plaintiff-Appellee,  
Cross-Appellant

v.

DIAMOND M DRILLING COMPANY,  
INC., Defendant-Appellant,

Cross-Appellee

and

Baker Shipyards, Inc.,

Defendant-Appellee.

No. 84-2492.

United States Court of Appeals,  
Fifth Circuit.

June 16, 1987.

Appeals from the United States District Court for  
the Southern District of Texas.

Before CLARK, Chief Judge, GEE, RUBIN, REAV-  
LEY, POLITZ, RANDALL, JOHNSON, WILLIAMS,  
GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL  
and JONES, Circuit Judges.

POLITZ, Circuit Judge:

This case occasions our reconsideration en banc of  
certain of our precedents involving the determination of  
maritime jurisdiction, and the requisites for a maritime  
tort action under 33 U.S.C. § 905(b). We reiterate today  
that when it enacted § 905(b), Congress did not create  
a new or broader cause of action in admiralty than that  
which previously existed, but rather, it curtailed available  
third party tort actions, and in doing so it neither ex-

panded nor constricted maritime jurisdiction.<sup>1</sup> We hold that in order for a waterborne structure to qualify as a "vessel" under § 905(b), it must be a vessel for purposes of maritime jurisdiction. Such a vessel must be capable of navigation or its special purpose use on or in water.<sup>2</sup> We further hold that to be cognizable under § 905(b), a tort must occur on or in navigable waters subject, of course, to the special provisions of the Admiralty Extension Act,<sup>3</sup> and there must be the traditional admiralty nexus.<sup>4</sup> As a consequence, we now reject the suggestion made in *Hall v. Hvide Hull No. 3*, 746 F.2d 294, 302-03 (5th Cir.1984), that the pre-*Executive Jet/Foremost Insurance* test for a maritime tort was codified in § 905(b) by the 1972 amendments to the Longshore and Harbor Workers' Act. Further, we reject use of the statutory definition of vessel in the LHWCA as the basis for the definition of vessel under § 905(b), as was done in *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5th Cir.1980), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981), and over-

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1. *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir.1976), *cert. denied*, 430 U.S. 960, 97 S.Ct. 1175, 51 L.Ed.2d 582 (1977); *Christoff v. Bergeron Industries, Inc.*, 748 F.2d 297 (5th Cir.1984); *May v. Transworld Drilling Co.*, 786 F.2d 1261 (5th Cir.1986).
  2. 1 U.S.C. § 3; *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir.1959); *Burks v. American River Transp. Co.*, 679 F.2d 69 (5th Cir.1982).
  3. Involving torts consummated on land but caused by vessels on navigable waters. 46 U.S.C. § 740; *Margin v. Sea-Land Services, Inc.*, 812 F.2d 973 (5th Cir.1987).
  4. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982).

rule the holding in *Trussell v. Litton Systems, Inc.*, 753 F.2d 366, 367 (5th Cir.1985), that a hull under construction, located "on a building platform in a building-way within the shipyard," and not on navigable waters, was a vessel for § 905(b) purposes.

### *Background*

Invoking admiralty and diversity jurisdiction, Michael Richendollar sued his employer, Diamond M Drilling Company, for vessel negligence under § 905(b),<sup>5</sup> and Baker Marine Corporation, under Texas tort law, for injuries sustained in a fall. Baker operated a shipyard near Aransas Pass in Ingleside, Texas, and was building a jackup drilling rig for Diamond M. The rig, the DON E. McMAHON, was positioned on blocks, on land, and was approximately 85% complete on October 17, 1980, the date of Richendollar's accident. At that time, the rig had holes in its hull and was not capable of navigation.

By arrangement with Baker, Diamond M put a special crew aboard the DON E. McMAHON to prepare it for drilling operations. Richendollar, a welder on that

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5. The 1984 Amendments to § 905(b), applicable to injuries occurring after September 28, 1984, would bar this claim by Richendollar and all similar claims. LHWCA Amendments of 1984, Pub.L. No. 98-426, § 5(b), 98 Stat. 1639, 1641. That section provides:

If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator or charterer of the vessel, no such [vessel negligence] claim shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

crew, was injured when a wire screen basket he was using for a workbasket broke, causing him to fall from the rig. The basket was poorly designed and constructed. A fuller recitation of the relevant facts may be found in the panel opinion, *Richendollar v. Diamond M Drilling Co., Inc.*, 784 F.2d 580 (5th Cir.1986).

Trial was had to a jury which found that the jackup drilling rig was a vessel under § 905(b), and that Richendollar was injured as a consequence of vessel negligence. The jury exonerated Baker. A divided panel of this court affirmed as to the liability of Baker and Diamond M and remanded to the district court for assessment of prejudgment interest. The case was voted en banc, thus vacating the panel opinion. See Internal Operating Procedures following Local Rule 35. We now reinstate the panel opinion to the extent it affirmed the dismissal of the claims against Baker, 784 F.2d at 584-86. However, we reverse the judgment against Diamond M, concluding that the DON E. McMAHON was neither a vessel for purposes of admiralty jurisdiction nor for a § 905(b) vessel negligence claim.

### *Discussion*

In *Parker v. South Louisiana Contractors*, we first addressed the import of the 1972 amendments to the LHWCA, particularly § 905(b). We were the first federal appellate court to do so. Parsing the language of the statute, which provided for suits against a vessel as a third party, for injuries caused by vessel negligence, and searching the legislative history and jurisprudential developments leading to the legislation, we concluded that in enacting § 905(b), Congress did not "create a new or

broader cause of action in admiralty,” and that “[t]aken as a whole, the manifest purpose of section 905(b) is to curtail rather than expand the availability of third party actions in admiralty.” 537 F.2d at 117. We further concluded that “[w]ith respect to third-party actions for negligence, . . . the boundaries of maritime jurisdiction as defined under prior law were neither expanded nor constricted by . . . the 1972 Amendments.” *Id.* (citation omitted).<sup>6</sup>

The genesis of the claim permitted by § 905(b) is *The OSCEOLA*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903), which recognized the warranty of seaworthiness to the crew of a vessel. This warranty was extended to longshoremen by *Seas Shipping v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), and *Reed v. The YAKA*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963). The ensuing *Sieracki* seaman litigation which, by virtue of the decision in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), permitted an injured employee to recover compensation benefits and then indirectly impose on his employer responsibility for tort damages, led to the 1972 amendments. The pre-1972 claims were entirely maritime in origin. The post-1972 claims are likewise so cast.

### *Jurisdiction*

Admiralty jurisdiction of a tort claim depends on whether the plaintiff can establish a maritime tort. That

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6. This decision has met with the uniform approval of our circuit colleagues. See, e.g., *Holland v. Sea-Land Service*, 655 F.2d 556 (4th Cir.1981); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir.1984); *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir.1985).

inquiry is essentially fact-bound, turning on a determination of the location of the tort, the situs factor, and the pertinent activity, the nexus factor. Prior to 1972 the question was purely geographic: did the tort occur on navigable waters. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), added the requirement "that the wrong bear a significant relationship to traditional maritime activity," *id.* at 268, 93 S.Ct. at 504.

For purposes of jurisdiction, the configuration of the watercraft is of secondary importance, for, as the Supreme Court held at the turn of this century:

Neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged.

*The ROBERT W. PARSONS*, 191 U.S. 17 (1903). This functional analysis is reflected in our lodestar definition of a vessel in *Offshore Co. v. Robinson*, 266 F.2d 769, 779 (5th Cir.1959), which includes not only conventional watercraft, but also "special purpose structures not usually employed as a means of transport by water but designed to float on water."<sup>7</sup> We reiterated that definition in *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973):

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7. *Robison* primarily addressed the definition of vessel under the Jones Act, but we also affirmed therein an unseaworthiness claim. In *Bernard v. Binnings Const. Co., Inc.*, 741 F.2d 824 (5th Cir.1984), we held that the test for a vessel was the same under the Jones Act and the unseaworthiness doctrine.

Conventional ships and barges as well as such unconventional craft as submersible drilling barges and floating dredges which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction...

Whatever the configuration of the waterborne structure might be, for maritime tort jurisdiction it must be in or on navigable waters. In *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205, 92 S.Ct. 418, 421, 30 L.Ed.2d 383 (1971) (citing *Thomas v. Lane*, 23 F.Cas. 957 (C.C.Me. 1813) (Story, J.)), the Supreme Court restated the traditional rule:

The historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States.

The DON E. McMAHON was under construction on land at the time of Richendollar's accident. It was not in or on navigable waters. It was not a vessel within the admiralty jurisdiction of the federal courts under the long-standing jurisdictional rubric, and § 905(b) did not extend that jurisdiction. Accordingly, there is no admiralty jurisdiction.

#### *Section 905(b) Vessel Negligence Claim*

Richendollar also invoked diversity jurisdiction for his § 905(b) vessel negligence claim and his Texas state law claim. The successful invocation of 28 U.S.C. § 1332 jurisdiction suffices for the latter, but it does not carry the day for the former. As noted by Chief Judge Clark in the panel dissent, 784 F.2d at 589, "[t]he sine qua non

of § 905(b) statutory liability for vessel negligence is the presence of a vessel which admiralty regards as a separate entity distinct from its owner.”

We have concluded that the DON E. McMAHON was not a vessel for purposes of admiralty jurisdiction. That conclusion forecloses Richendollar’s maritime tort claim, for if the DON E. McMAHON is not a vessel for purposes of admiralty jurisdiction, it is not a vessel for purposes of the § 905(b) vessel negligence claim. Richendollar’s claim in this case for injury on land is not cognizable under § 905(b).

### *Conclusion*

We conclude that the DON E. McMAHON was not a vessel for either admiralty jurisdiction or § 905(b) vessel negligence purposes at the time of Richendollar’s accident, for it was then under construction, on land, and incapable of flotation and not on or in navigable waters, and capable of navigation or flotation for a special commercial purpose.

The judgment of the district court rejecting the demands against Baker Marine Corporation is **AFFIRMED**. The judgment against Diamond M Drilling Company is **REVERSED**.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

JOE ROSETTI

CIVIL ACTION

— VERSUS

NO. 82-747

AVONDALE SHIPYARDS, INC.—

SECTION "H"

JUDGMENT

Considering the Court's Reasons for Judgment filed herein dated August 13, 1983,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Avondale Shipyards, Inc., and against plaintiff, Joe Rosetti, dismissing plaintiff's complaint with cost.

New Orleans, Louisiana, this 19th day of August, 1983.

/s/ A. Duplantier  
UNITED STATES  
DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

JOSE ROSETTI

CIVIL ACTION

VERSUS

NO. 82-747

AVONDALE SHIPYARDS, INC.

SECTION "H"

REASONS FOR JUDGMENT

Plaintiff, Joe Rossetti, was injured while working as a pipe fitter in the construction of a vessel, the OGDEN I, at defendant's shipyard. Plaintiff, an employee of Universal Systems, Inc., was injured when he tripped over a welding line while traversing a deck on the ship on which he was working. Defendant Avondale owned and controlled the OGDEN I at the time of plaintiff's accident.

Plaintiff seeks damages from Avondale under a theory of maritime negligence statutorily preserved by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 905(b). Based upon diversity jurisdiction, plaintiff sets forth a state law negligence claim as well.

Defendant Avondale has filed a motion for summary judgment. For the reasons discussed below, the motion is granted.

### MARITIME TORT

At the time of the accident, the OGDEN I was not a "vessel" for the purpose of a Section 905(b) negligence action. The defendant has shown, by deposition of its insurance manager and affidavit of its project manager, that the ship was only 80-85% complete at the time of the accident, the "majority" of the navigation equipment had not been installed, and neither dock trials nor sea trials had taken place. In addition, no vessel operations crew had been assigned. All personnel aboard at the time of the accident were involved in the construction of the OGDEN I. The first sea trials took place five months after the plaintiff's injury.

The project manager's affidavit is uncontradicted. The plaintiff has submitted three affidavits that he contends pose a genuine issue of material fact as to the stage of completeness of the vessel. The three affidavits are executed by the plaintiff and two of his fellow workmen, also Universal employees. These affidavits fail to meet the requirements that they "be made on personal knowledge" and "show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Unlike the affidavit submitted by defen-

dant, there is no affirmative indication that any of these affiants is competent to testify as to the stage of completeness of a vessel under construction. The affidavits therefore are not adequate to raise genuine issues of material fact.

It is well established that Section 905(b) does not create a new cause of action for negligence. *Russell v. Atlantic & Gulf Stevedores*, 625 F.2d 71 (5th Cir. 1980). Because Section 905(b) merely preserves an injured worker's right to recover damages from third parties in accordance with traditional nonstatutory negligence principles, it can not serve as a separate basis for jurisdiction. Since the ship under construction was not a "vessel," maritime jurisdiction does not exist.

### STATE LAW TORT

It is clear that the compensation scheme of the Longshoremen's and Harbor Workers' Compensation Act applies in this case. When an employee begins work for an employer under the coverage of LHWCA, he consents to the Act's tradeoff of certain and absolute benefits in lieu of less certain benefits obtainable in tort actions. *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977). The Act makes compensation the exclusive remedy for the injured employee against his employer. 33 U.S.C. Sections 904(a), 905(a), 933(i). Although plaintiff was the nominal employee of Universal, defendant contends that it also enjoys immunity from tort by virtue of the "borrowed servant" doctrine. If an employee is found to be a "borrowed servant", his exclusive remedy against the "borrowing employer" is compensation under the Act. *Gaudet, supra*.

The Fifth Circuit has recently observed that the "central question" in determining "borrowed servant" status "is whether someone has the power to control and direct another person in the performance of his work." *Hebron v. Union Oil Co.*, 634 F.2d 245, 247 (5th Cir. 1981). The record strongly supports defendant's position as the "borrowing employer" of Rosetti. The plaintiff's own deposition indicates that Avondale exercised virtually complete control over Universal employees such as plaintiff. Avondale furnished all supervision; Universal merely supplied the manpower to work under Avondale's direction and control. Avondale could promote Universal employees to supervisory positions and could fire them for any reason. No material issues of fact remain with regard to issues determinative of borrowed employee status. Defendant's status as borrowing employer under LHWCA operates as a bar to plaintiff's state law negligence claim.

Because there are no genuine issues of material fact and defendant is entitled to judgment as a matter of law, Avondale's motion for summary judgment is granted.

August 18, 1983

/s/ A. Duplantier  
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

JOE ROSETTI—  
VERSUS  
AVONDALE SHIPYARDS, INC.

CIVIL ACTION  
NO. 82-747  
SECTION "H"

J U D G M E N T

The court having previously granted the motion for summary judgment against Avondale Shipyards, Inc.; and

the court having determined that there is no just reason for delay and expressly directed the entry of judgment dismissing the complaint as to the said defendant in accordance with Rule 54(b) of the Federal Rules of Civil Procedure;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Avondale Shipyards, Inc., and against plaintiff, Joe Rosetti, dismissing said plaintiff's suit against the above mentioned defendant at plaintiff's cost.

New Orleans, Louisiana, this 5th day of November, 1985.

/s/ A. Duplantier  
UNITED STATES DISTRICT JUDGE

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NO. 87-753

FILED

DEC 10 1987

JOSEPH F. SPANGLER, JR.  
CLERK

**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1987**

**JOE ROSETTI,**

**Petitioner,**

**versus**

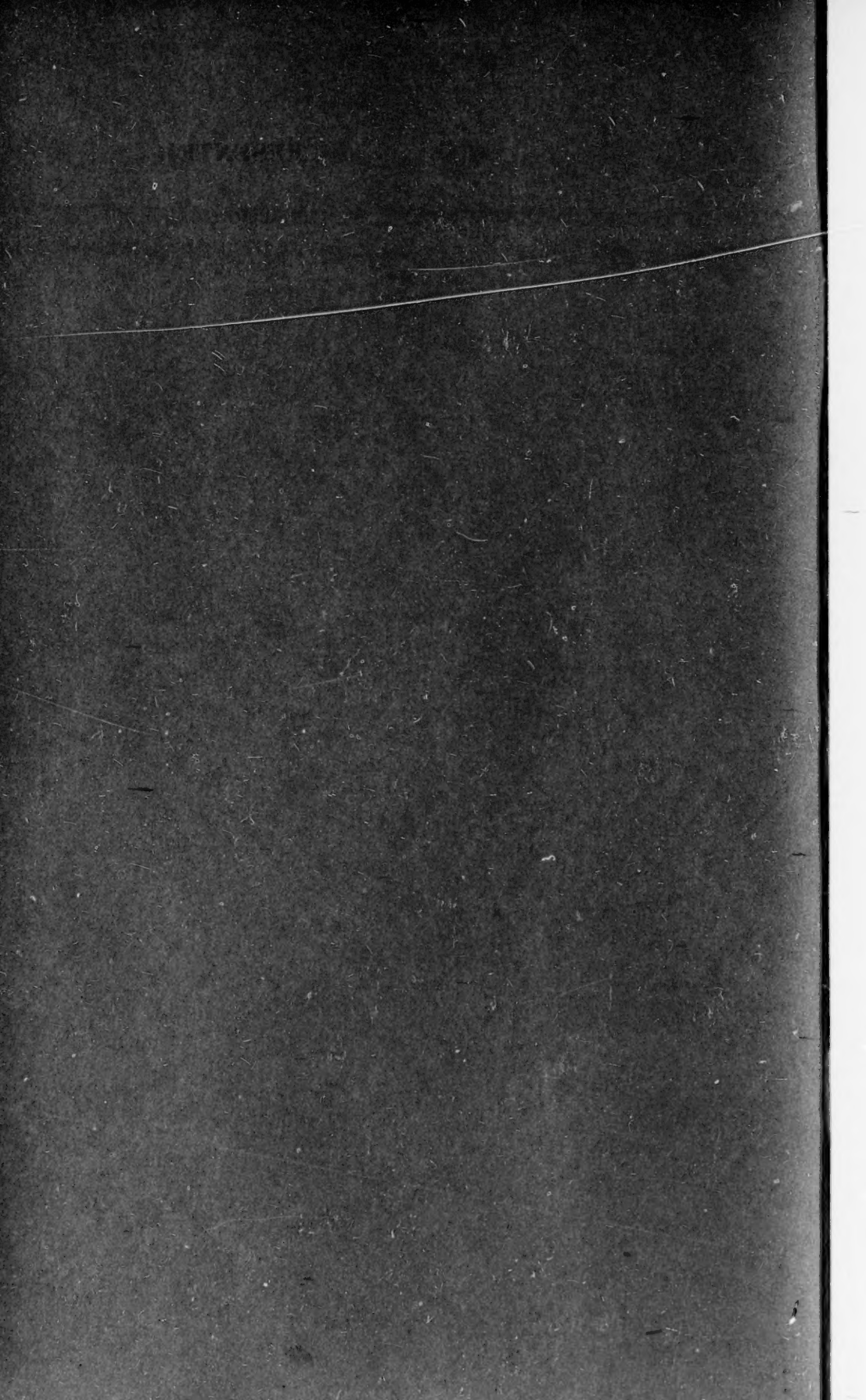
**AVONDALE SHIPYARDS, INC.,**

**Respondent.**

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

A. Does Admiralty Jurisdiction exist over a claim arising out of the construction of an incomplete vessel, incapable of navigation?

B. Did the 1984 amendments to the Longshore and Harborworker's Compensation Act, 33 USC 901, *et seq.*, abolish the "borrowed employee doctrine" and the immunity to third-party tort liability enjoyed by the borrowing employer?

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## ARGUMENT

A. The definition of "vessel" contained in the Longshore and Harborworker's Compensation Act and the General Code are irrelevant to the determination of admiralty jurisdiction where the activity giving rise to the action does not bear any significant relationship to traditional maritime activity.

Writs should be denied in this case because no real conflict exists between the Circuits, as petitioner suggests, on the key legal issue presented in this matter: admiralty jurisdiction. Furthermore, since *Richendollar v. Diamond M Company*, 819 F.2d 124 (5th Cir. 1987) overruled *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), the "confusion" alleged by petitioner to have existed in the circuits concerning the implication of the decision in *Director, Office of Workers' Compensation Programs v. Perini North River Association*, 459 US 297, 103 S.Ct. 634 (1984) no longer exists.

Petitioners contend that a "split" of authority exists between the First and Fifth Circuits, on the one hand, and the Second Circuit, on the other, regarding the presence/absence of admiralty jurisdiction over third-party tort actions under Section 905(b) of the Longshore and Harborworker's Compensation Act arising out of vessel construction. See *Richendollar v. Diamond M Company*, *supra*; *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985) and *McCarthy v. THE BARK PEKING*, 716 F.2d 130 (2nd Cir. 1983). In fact, these decisions can be reconciled rather easily.

*Richendollar* and *Drake* both involve the question of whether admiralty jurisdiction exists over shipyard workers exerting a Section 905(b) tort claim against a defendant vessel owner injured in the course of the

construction of a vessel. These cases both concluded that admiralty jurisdiction did not exist under the the *Executive Jet/Foremost Insurance* analysis.

*McCarthy*, *supra*, cited by Petitioner as the rogue case which justifies the granting of a writ in this case, initially concluded that the plaintiff, McCarthy, could not pursue a Section 905(b) action against his employer, a museum, because he was not engaged in "maritime employment" at the time of his accident, as required by the Act. The Supreme Court remanded the *McCarthy* case to the Second Circuit Court of Appeals for reconsideration, based upon the decision in *Director, Office Of Workers' Compensation Programs, etc., v. Perini North River Associates, supra*. The issues presented and considered in *McCarthy*, on remand, were whether the plaintiff was a covered employee (pursuant to *Perini*) and whether THE BARK PEKING was a "vessel" against which an action could lie. The question of adequate "nexus" of the wrong to traditional maritime activity was neither discussed nor decided in *McCarthy*, as it was in *Richendollar* and *Drake*.

The instant case is clearly the progeny of *Richendollar*, as is plainly evident from the first sentence of the *per curiam* opinion below. *Richendollar*, was a monumental decision in the realm of admiralty jurisdiction, decided only after a rare rehearing *en banc*, explicitly reversing or overruling earlier holdings in several cases, including *Hall v. Hvide Hull No. 3, supra*, with which the instant case was consolidated on appeal. Writs were denied by this Court in the *Richendollar* case, which would obviously control the outcome of the case at bar. If writs were denied in *Richendollar*, it makes no sense to grant them in this case.

The only distinction offered by petitioners in this case to escape the *Richendollar* precedent is that in *Richendollar*, the injury occurred on *land* while in this case, the

vessel had already been launched. Petitioner offers a 1902 decision of this Court to support the distinction. *Tucker v. Alexandroff*, 183 U.S. 424, 22 S.Ct. 195 (1902). This distinction is without significance, since it is conceded that the vessel in this case, the OGDEN I, was afloat on navigable waters at the time of the accident, and therefore met the "situs" requirement of admiralty jurisdiction. What is at issue here, as in *Richendollar*, is whether the "nexus" requirement has been met. Thus, the fact that the accident here occurred on navigable waters is completely irrelevant, and the case at bar is indistinguishable in any significant sense from the holding of the Fifth Circuit Court of Appeals in *Richendollar*.

The fundamental point made in *Richendollar*, of course, is that for the nexus requirement to be met:

"such a vessel must be capable of navigation or its special purpose use on water." *Richendollar*, *supra*, at page 125."

In *Richendollar*, the DON E. McMAHON was 80% complete, had holes in its hull, and was not capable of navigation. In *Rosetti*, the OGDEN I was not navigable: the majority of the navigation equipment was not installed, dock and sea trials had not taken place, and no vessel crew had been assigned to the vessel. The OGDEN I was between 80 and 85% complete at the time of the accident. See *Per Curiam* opinion below, reproduced in petitioner's appendix at A-27; *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984). The OGDEN I was no more navigable at the time of the accident in this case than was the DON E. McMAHON when *Richendollar* was injured. In light of the Admiralty Extension Act, 46 USC 740, the fact that the DON E. McMAHON was located on land would not have defeated admiralty jurisdiction if it had been capable of navigation. Thus, the situs issue is a completely bogus distinction.

Petitioners repeatedly cite this Court's decision in *Perini* as if that case mandated a contrary result here, and that the opinions in *Richendollar* and *Drake* somehow run contrary to *Perini's* holding. This argument merits little consideration.

*Perini* rejected the argument, advanced by the defendant in that case, that the LHWCA coverage for *compensation* benefits under Section 905(a) is premised upon admiralty jurisdiction, requiring a connection between an employee and traditional maritime activity. The Court was cognizant of the fact that Congress did not intend to withdraw *compensation* benefits to those workers who had already been covered by the Act prior to the 1972 amendments. However, while Congress *expanded* coverage for *compensation* benefits under the Act, the congressional intent with respect to Section 905(b) actions was to *restrict* benefits previously reserved to maritime workers under the Act by, for example, abrogating the right of such workers to a warranty of seaworthiness. The *Richendollar* decision expressly noted this restriction of *tort* benefits provided by Section 905(b) by reference to the decision in *Parker v. South Louisiana Contractors*, 537 Fd.2d 113 (5th Cir. 1976) which held, *inter alia*:

"Taken as a whole, the mainifest purpose of Section 905(b) is to curtail rather than expand the availability of third-party actions in admiralty."  
*Richendollar*, *supra*, at page 126.

Furthermore, if any doubt remained about Congressional intent, it should be noted that the 1984 amendments to Section 905(b) further curtailed third-party actions by abrogating all such actions against employers which had theretofore been judicially recognized since the hallmark decision in *Smith v. M/V CAPTAIN FRED*, 546 Fd.2d 119 (5th Cir.1977). The 1984 amendments, applicable here,

would undoubtedly bar the instant action altogether had it occurred after September 28, 1984. LHWCA Amendments of 1984, Pub.L. No. 98-426, Section 5(b), 98 Stat. 1639, 1641.

Accordingly, while the Second Circuit in *McCarthy* was corrected by the Supreme Court insofar as its initial decision regarding the scope of "maritime employment" was concerned, the panel of the Fifth Circuit which utilized *Perini* to extend admiralty jurisdiction in *Hall v. Hvide Hull No. 3, supra*, was clearly wrong to do so. *Perini* said nothing regarding tort actions which could be construed as expanding admiralty jurisdiction. Petitioner relies also on *Eagle-Picher Industries, Inc. v. United States of America*, 657 F.Supp. 803 (E.D.Pa. 1987) which followed *Hall v. Hvide Hull No. 3, supra*, and *Perini* (as interpreted by *Hall*). However, since *Richendollar*, it is doubtful whether the District Court in that case would have decided the case before it in the same way. Furthermore, relying as it did on *Hall v. Hvide Hull No. 3, supra*, which has now been overruled *en banc*, the *Eagle-Picher* case is now simply an aberration.

Finally, it makes no difference as petitioner suggests that the OGDEN I would come within the definition of "vessel" in the Act itself or, for that matter, the general code definition contained in 1 USC Section 3. If it did not, of course, the Act itself would bar this action. But the fact that the OGDEN I does concededly fall within the definition of "vessel", does not, *ipso facto*, confer admiralty jurisdiction as petitioners would suggest. Without such jurisdiction, a Section 905(b) tort action will not lie notwithstanding the fact, as in this case, that diversity jurisdiction also exists. *Drake v. Raymark Industries, Inc., supra*.

While the OGDEN I may be a "vessel", according to

the Act or the General Code, the undisputed fact that it was incapable of navigation or its special purpose use on or in water deprives petitioner of any right of action in admiralty because the hull under construction at the time of the accident lacks a sufficient nexus to traditional maritime activity. Longstanding precedent has confirmed time and again that Section 905(b) of the LHWCA did not *create* a new cause of action, but merely *preserved* one. *Russell v. Atlantic and Gulf Stevedores*, 625 F.2d 71 (5th Cir. 1980); *William P. Brooks Construction Company, Inc. v. Guthrie*, 614 F.2d 509 (5th Cir. 1980); *Gay v. Ocean Transport and Trade Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Parker v. Southern Louisiana Contractors*, *supra*. Furthermore, vessel construction has repeatedly been held not to have sufficient connection to traditional maritime activity to support admiralty jurisdiction. *Frankel v. Bethlehem Fairfield Shipyard, Inc.* 132 F.2d 634 (4th Cir. 1942) cert. den. 319 U.S. 746, 63 S.Ct. 1030 (1943); *Hollister v. Luke Construction Company*, 517 F.2d 920 (5th cir.1975); *Alfred v. M/V MARGARET LYKES*, 398 F.2d 684 (5th Cir. 1968); *Garcia v. American Marine Corp.*, 432 F.2d 6 (5th Cir. 1970); and a host of other decisions.

Thus, there exists no conflict in the circuits, as petitioner suggests, nor any further confusion about the application of *Perini* since the *Richendollar* decision expressly overruled the earlier *Hall v. Hvide Hull No. 3* case, *supra*, upon which relied the District Court in *Eagle-Picher Industries Inc. v. United States of America*, *supra*. Accordingly, this Court should deny petitioner's writ application.

**B. The 1984 amendments to the LHWCA which would otherwise bar petitioner's action did not abolish the borrowed employee doctrine nor abrogate the tort immunity enjoyed by a borrowing employer under the Act.**

Apparently, as an afterthought, petitioner attempts to wriggle out from under the exclusive immunity portion of the LHWCA, which renders Avondale otherwise immune from this tort action, by claiming that since Avondale did not secure the payment of compensation benefits to Rosetti, it should not be deemed immune from his tort action. See 33 USC 905(a) (1984). Assuming this amendment is applicable to this action, for the moment, as petitioner suggests, and the same 1984 amendments which would clearly bar this action are not, petitioner's argument is fallacious. Petitioner confuses the implications of a "statutory" employer, as was the case in *Washington Metropolitan Transit Authority v. Johnson*, \_\_\_ U.S. \_\_\_, 104 S.Ct. 2827 (1984), for which the 1984 amendments were enacted, with that of a "borrowing employer". See *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977); *Hebron v. Union Oil Company*, 634 F.2d 245 (5th Cir. 1981). In any case, it has already been decided that the 1984 Amendments did not abolish the borrowed employee doctrine in such cases as these. *West v. Kerr McGee Corp.*, 765 F.2d 526 (5th Cir. 1985).

Ironically, petitioner cites only the concurring opinion in the *West v. Kerr McGee Corp* decision, at page 20 of his Brief. It is interesting to note that this isolated statement in the *West* case was authored by Judge Albert Tate in the concurring opinion, rather than the majority which, in their decision, expressly rejected the same argument being made here by petitioner. It should also be pointed out that the same author also wrote the misbegotten decisions in *Lundy v. Litton Systems, Inc.*, *supra* and *Hell v. Hvide Hull No. 3*, *supra*, which initially created the confusion which the *en banc* decision in *Richendollar* has since resolved.

**CONCLUSION**

Since no *bona fide* "split" of authority exists regarding the existence of admiralty jurisdiction over an accident arising out of construction of an incomplete vessel, incapable of navigation, and since the *Perini* decision is inapplicable to third-party tort actions, there is no basis for the granting of a Writ of Certiorari in this case. Likewise, since the borrowed employee doctrine has been held to have existed since the 1984 Amendments to the LHWCA, petitioner's attempt to avoid the immunity provisions of Section 905(b) of the Act is meritless.

Respectfully submitted,

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**CERTIFICATE**

I hereby certify that a copy of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari has been mailed to Judy M. Guice, 310 Main Street, Post Office Box 1388, Biloxi, Mississippi, 39533 by depositing it in the United States mail postage prepaid and properly addressed.

Metairie, Louisiana, this 7th day of December, 1987.

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**NELSON W. WAGAR, III**